A

**ENG SAY KUANG**

**v.**

**HONG LEONG BANK BHD**

B

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CIVIL SUIT NO: 23-20-2002]
18 FEBRUARY 2008

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against judgment in favour of plaintiff - Loan facilities - Triable issues - Delay - Undue preference - Non-stamping of documents relating to guarantee - Rules of the High Court 1980, O. 14*

D ***BANKING:*** *Securities for advances - Guarantee - Appeal against summary judgment - Triable issues - Delay - Undue preference - Non-stamping of documents relating to guarantee - Rules of the High Court 1980, O. 14*

E F G H I This was an appeal by the 3rd defendant against the decision of the senior assistant registrar entering summary judgment against the 3rd defendant under O. 14 of the Rules of the High Court 1980 ('O. 14'). The plaintiff/respondent had granted various banking facilities to one Victory Industries (M) Sdn Bhd, the 1st defendant, which was accepted by the 1st defendant through its directors, the 2nd and 3rd defendants, the guarantors. The 1st defendant defaulted in the repayment of the loans, and when the defendants did not respond to the plaintiff's demands, the plaintiff filed a suit against them and sought summary judgment. The plaintiff's application was granted, resulting in the present appeal. The following issues were submitted by the 3rd defendant: (i) there was a delay on the part of the plaintiff in filing the O. 14 application. It was argued that the plaintiff had only filed the O. 14 application seven months after the 3rd defendant had filed the statement of defence, and that delay was justifiable enough to deprive the plaintiff from obtaining summary judgment against the 3rd defendant; (ii) the plaintiff had practised fraud in that he had intentionally in writing demanded from the principal debtor (Victory Industries) the outstanding sums that were due and owing to the plaintiff even though the plaintiff had notice that the principal debtor was wound up on 18 January 2002. It was averred that such practice was illegal and contrary to written law, especially s. 293 of the Companies Act 1965 and s. 53 of the Bankruptcy Act 1967, because it would operate to confer undue preference on behalf of the plaintiff over the other creditors of the defendant company, including the secured creditors; and (iii) the documents relating to the guarantee in this case were not duly stamped *ie*, they were stamped for a lesser sum thus making the documents inadmissible as evidence.

**Held (dismissing the appeal):**

**(1)** Delay is no longer a ground to deprive the plaintiff from obtaining an order under O. 14 in the event the defendant could not demonstrably show a triable or arguable case. Additionally, the law also does not impose any duty on the plaintiff's part to provide any explanation to the court if there is delay in moving the court to hear the O. 14 application. Henceforth, even though the plaintiff in this case failed to provide any explanation for the delay in filing the O. 14 application, it was not fatal to the plaintiff's case. *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* (foll); *Batu Emas Enterprise v. Syarikat Awang Radin & Ors* (foll). (paras 6, 7, 8, & 9)

**(2)** The uncontroverted facts in this case revealed that the presentation of the petition of winding up and the winding up order against Victory Industries was clear evidence that the debtor was unable to pay its debt and, thus, had given the plaintiff the right to bring a suit against the defendants. In such a situation, the defendant's submission on undue preference as a triable issue could not be sustained. *Meidin Electric Engineering Sdn Bhd v. Mtrans Holding Sdn Bhd* (foll). (paras 13, 14 & 15)

**(3)** The issue of non-stamping of the guarantee was not a triable issue and not relevant in an O. 14 application. Equally this issue did not merit further investigation. Be that as it may, from the affidavit evidence, the disputed documents were duly stamped, according to the Stamp Ordinance 1949 that was in force at the time when the Letter of Guarantee was executed by the 3rd defendant and an adequate payment was duly paid by the plaintiff. *Public Bank Bhd v. Siaw Sat Lin* (foll). (paras 16, 17, 18 & 19)

**(4)** For the reasons given above, the senior assistant registrar did not err in making his decision. (para 20)

**Case(s) referred to:**

*Abdullah Rohani v. Punca Klasik Sdn Bhd [2004] 1 CLJ 773 CA* ***(refd)***

*American Express International Banking Corp v. Tan Loon Swan [1992] 1 CLJ 9; [1992] 1 CLJ (Rep) 1 SC* ***(refd)***

*Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC* ***(refd)***

*Batu Emas Enterprise v. Syarikat Awang Radin & Ors [1995] 2 CLJ 69 HC* ***(foll)***

*Jamaliah Hj Mahsudi & Ors v. Sivam Munusamy & Anor [1998] 1 LNS 362 HC* ***(refd)***

*Krishnamurthy Nagaratnam & Anor v. The Malayan Finance Corp. Bhd [1986] 1 CLJ 541; [1986] CLJ (Rep) 170 SC* ***(refd)***

*Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd & Ors [1982] CLJ 66; [1982] CLJ (Rep) 217 FC* ***(refd)***

A *Meiden Electric Engineering Sdn Bhd v. Mtrans Holdings Sdn Bhd [2006] 7 CLJ 519 HC* ***(foll)***
*National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC* ***(refd)***
*Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA* ***(foll)***
B *Platicorp Holdings (M) Sdn Bhd & Ors v. Timbunan Alam Development Sdn Bhd & Anor [2006] 1 LNS 293 HC* ***(refd)***
*Public Bank Bhd v. Siaw Sat Lin [2001] 1 LNS 145 HC* ***(foll)***
*Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Molding Industries Sdn Bhd [1998] 4 CLJ 557 FC* ***(refd)***
C *South East Asia Insurance Bhd v. Kerajaan Malaysia [1998] 1 CLJ 1045 CA* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, s. 53
Companies Act 1965, s. 293
D Rules of the High Court 1980, O. 14

*For the appellant - TY Lim; M/s GF Nelson & Co*
*For the respondent - Kee Tong Kiak; M/s Chee Siah Lee Kee & Partners*

*Reported by Suresh Nathan*

E

## JUDGMENT

**Ahmadi Asnawi JC:**

F **[1]** This appeal was lodged by the appellant (3rd defendant) against the decision of the senior assistant registrar who had on 25 April 2003 entered summary judgment against the 3rd defendant in the sum of RM210,734.25 and RM1,334,047.57 as at 28 February 2002, with interests and costs under O. 14 of the Rules of the High Court 1980.

G **[2]** The brief facts of this case are as follows. The plaintiff (respondent) approved and granted various banking facilities to Victory Industries (M) Sdn Bhd (1st defendant) for a sum of RM 6,000,000 subject to the terms and conditions as stated in the letters of offer dated 22 June 1999 and 2 July 1999. In relation thereto, the borrower (Victory H Industries) through its directors (2nd and 3rd defendant) accepted the banking facilities and has given the director's resolution. Consequently, both the said directors signed the facilities agreement dated 16 July 1999 to secure the said facilities, and on the same date a letter of set-off was executed by the said directors. Briefly, the 2nd and 3rd defendants I guaranteed the repayment of all moneys becoming payable and owing by the first defendant to the plaintiff pursuant to the said terms and conditions. The moneys under the said loans were duly released. In the

event, the first defendant defaulted in the repayment of the said loans amounting to RM208,692.93 for the overdraft facilities, and RM1,319,384.99 for the bankers acceptance. Separate notices of demand dated 5 February were issued to the defendants, but not responded by the defendants. Thereafter, the plaintiff filed a suit against all the defendants on 14 Mac 2002, and on 22 October 2002 the plaintiff filed a summons in chambers under O. 14 Rules of the High Court 1980 for summary judgment. The matter came before the learned senior assistant registrar who on 25 April 2003 granted an order in terms of the application. Being dissatisfied with the decision of the learned senior assistant registrar, the 3rd defendant filed this appeal.

**[3]** The legal position is clear in that the only issue before the court in an application under O. 14 of the Rules of the High Court is whether there are triable issues meriting a full trial for its determination. Therefore, what needs to be proven by the defendant in an O. 14 application is to show that there is a triable issue or issues that ought to be heard in full. A single issue meriting trial is sufficient to deny the applicant a judgment under O. 14 (per Shaik Daud Ismail in *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045. In short, to be entitled to defend one's case, he must be able to raise a triable or arguable issue that ought to be set down for trial. In *Abdullah Rohani v. Punca Klasik Sdn Bhd* [2004] 1 CLJ 773, Abdul Hamid Mohamad JCA said:

> We remind ourselves that this appeal arises from a summary judgment under O. 14 of the RHC 1980. It is trite law that in such an application the onus on the defendant (appellant) to be entitled to defend the action in a fall trial, is to satisfy the court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial ..." O. 14 r. 3(1). Courts have described it as "arguable issue" or "triable issue". Thus in *Voo Min En & Ors v. Leong Chung Fatt* [1982] 1 LNS 47 (SC) it was said that "... The issue raised must be an arguable issue." In *Ng Hee Thong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, the Court of Appeal asked the question "Is there a *bona fide* triable issue?.

**[4]** However, before the defendant is required to prove a triable issue, there are preliminary requirements that must be fulfilled by the plaintiff for the purpose of O. 14 application. Those guidelines as elucidated by the Federal Court in the case of *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 are in the following terms:

A We think it appropriate to remind ourselves once again that in every application under Order 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:

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(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

C (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.

It is to be observed that a case is not within Order 14(a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope
D of Order 14 as coming within Rule 1(2); (c) where the affidavit in support of the application is defective, e.g. in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government [Order 73 Rule 5(1)].

E If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him [see Order 14 Rules 3 and 4(1)].

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In accordance with O. 14 r. 3 all the respondent needs to show is that there is a triable issue as to a matter of fact or any real difficulty as to a matter of law. In *Voo Min Eu v. Leong Chung Fatt* [1982] 1 LNS 47; [1982] 2 MLJ 241 Salleh Abas FJ has said that it is not enough for the respondent in answer to the appellants' application to sign final
G judgment to raise an issue or any issue. The respondent must raise such issue as would require a trial in order to determine it or in other words, the issue raised must be an arguable issue. With these basic principles in mind we will now deal with the issues raised by the respondent in opposing the appellant's application.

H **[5]** In this case, all the requirements as stated in National Company for Foreign Trade has been obeyed by the plaintiff, and therefore the defendants must now demonstrate that there is a triable issue or issues that needs to be argued and a full trial hereafter is indispensable. Mohd Azmi FCJ in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors*
I [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 said:

In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* had this to say at p. 217:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a traible issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey and European Asian Bank AG v. Punjab & Sind Bank* at p. 516)

**[6]** The first issue submitted in this appeal is about the delay on the part of the plaintiff in filing the O. 14 application. In this case, the writ and statement of claim was filed on 14 Mac 2002. The defendant filed his statement of defence on 8 April 2002. It was argued that plaintiff had only filed the O. 14 application seven months after the defendant

A has filed the statement of defence, and that delay is justifiable enough to deprive the plaintiff from obtaining summary judgment against the 3rd defendant. In relation to this issue of delay in the filing of the O. 14 application, in my view the law on this matter is now settled on account of the decision in *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine* B *Bulk Transport New York* [1998] 1 CLJ 424, 429 CA where Gopal Sri Ram JCA pronounced that delay cannot be an answer to an application under O. 14 of the RHC where there were no *bona fide* triable issues. According to His Lordship:

> C When properly understood, there is nothing in *Ng Hee Thoong*'s case to suggest that an application for summary judgment maybe defeated solely on the ground that there has been delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely answer to an application made under O. 14 where there are no *bona fide* triable issues.

D **[7]** Prior to this case, the law as to the time when an application for an O. 14 judgment could be made is very restrictive in that the plaintiff who intended to file the application must exercise his right within the time frame as stipulated by the Rules of the High Court. It must be made after an appearance has been entered and it could be made either E before or after the delivery of defence provided that where it was made after the delivery of the defence, there must be an explanation for the delay (per Salleh Abbas LP In *Krishnamurthy Nagaratnam & Anor v. The Malayan Finance Corp. Bhd* [1986] 1 CLJ 541; [1986] CLJ (Rep) 170). But the position has now been clarified by the Court Of Appeal in F *Perkapalan Shamelin*, in which delay is no longer a ground to deprive the plaintiff from obtaining an order under O. 14 in the event the defendant could not demonstrably show a triable or arguable case.

**[8]** Additionally, the law also does not impose any duty on the part of the plaintiff to provide any explanation to the court if there is delay G in moving the court to hear the O. 14 application. The law on this point is clear and does not deserve any further consideration by this court. In *Batu Emas Enterprise v. Syarikat Awang Radin & Ors* [1995] 2 CLJ 69, the court held:

> H It seems to me that where there is no explanation for a delay in making an application under O. 14, it is not fatal *per se*. It is for the court to exercise its discretion in determining whether or not to proceed with the hearing of the application even through *(sic)* (though) there is no explanation for (the) delay in making the application'.

I **[9]** Henceforth, even though the plaintiff failed to provide any explanation for the delay in filing the O. 14 application, it is not fatal to the plaintiff's case. The issue of delay is not something that is material to O. 14 application. Gopal Sri Ram JCA in *Perkapalan Shamelin Jaya*, stated:

In our judgment, authority that is plainly against the appellants concludes the point taken by counsel. We have in mind, of course, the judgment of Raja Azlan Shah J (as he then was) in *Comptroller General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98. His Lordship in granting a summons for judgment taken out about three months after appearance had been entered to the writ applied the following passage in the judgment of Baron Pollock in *McLardy v. Slateum* [1890] 24 QBD 504, 506:

The view taken by other judges, and by the masters, is that the intention of O. 14 r. 1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O. 14 right and proper.

We think that this is the proper construction of the rule ... *Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory*. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O. 14 r. 1 because a defence has been delivered ... If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case. (emphasis added).

**[10]** In the meantime, in the case of *Jamaliah bte Hj. Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah bte Hj Ali) & Ors v. Sivam a/l Munusamy & Anor* [1998] 1 LNS 362 Faiza Tamby Said explained the consequences of the Court Of Appeal's decision in *Perkapalan Shamelin Jaya's* case regarding the technical objection of delay. He said:

The technical objection of delay is no longer a valid objection after the decision of the Court of Appeal in the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1997] 3 MLJ 818. In that case, the Court of Appeal held that a proposition that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court runs counter to the interest of justice and that delay can surely provide no answer to an application made under O. 14 where there are no bone (sic) *(bona) fide* triable issues.

**[11]** Even the fact that the matter has been set down for trial would not bar an O. 14 application at this point of time, (per Abdul Malik Ishak J in *Platicorp Holdings (M) Sdn Bhd & 3 Ors v. Timbunan Alam Development Sdn Bhd & Anor* [2006] 1 LNS 293).

**[12]** For the reasons aforesaid, in my opinion the defendant's objection on this ground does not deserve further consideration. The position has changed and this court should not be concerned about the technical objection anymore.

**[13]** The second issue raised by the 3rd defendant was that the plaintiff has practiced fraud in that he has intentionally in writing demanded from the principal debtor (Victory Industries) for the outstanding sums that were due and owing to the plaintiff even though the plaintiff has notice that the principle debtor was wound up on 18 January 2002. It is submitted on behalf of the 3rd defendant, that such practice is illegal and contrary to written law, especially s. 293 of the Companies Act 1965 and s. 53 of the Bankruptcy Act, because it will operate to confer undue preference on behalf of the plaintiff over the other creditors of the defendant company including the secured creditors. In the case of *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Molding Industries Sdn Bhd* [1998] 4 CLJ 557, the Federal Court postulated the principle of undue preference as follows:

> The law relating to fraudulent preferences is set out in s. 53 of the Bankruptcy Act, which is made applicable to companies by s. 293 of the Companies Act, and is designed to preserve the sanctity of the *pari pasu* principle by which creditors in a winding up share rateably in the assets available for distribution. As in bankruptcy cases, a creditor of a company is not entitled to a set-off against his obligation to repay the preference. (See, *In re A Debtor* [1927] 1 Ch. 410; *Calzaturificio Zeneth Pty Ltd (In Liquidation) v. N.S.W. Leather and Trading Co. Ltd.* [1970] VR 605).

**[14]** As a matter of fact, the application of the principle of undue preference under s. 293 of the Companies Act 1965 and s. 53 of the Bankruptcy Act was discussed and explained by Wan Adnan Muhammad H in the case of *Meiden Electric Engineering Sdn Bhd v. Mtrans Holdings Sdn Bhd* [2006] 7 CLJ 519. He said:

> Pada pendapat saya peruntukan s. 293 Akta Syarikat 1965 dan s. 53 Akta Kebangkrapan 1967 tidak terpakai kepada fakta kes ini. Oleh itu isu 'undue preference' tidak berbangkit. Seksyen-seksyen berkenaan hanya terpakai kepada likuidator sahaja. Peruntukan s. 53(1) Akta Kebangkrapan yang dibaca bersama s. 293 Akta Syarikat jelas menyebut "as against the official assignee". Ia selaras dengan tanggungjawab likuidator bagi mengurus proses penggulungan syarikat. Dalam kes *Sime Diamond Leasing (M) Sdn. Bhd. v. J.B. Precision Moulding Industries Sdn. Bhd. (in liquidation)* [1998] 4 CLJ 557 di halaman 568 Edgar Joseph HMP menegaskan seperti berikut (dalam bahasa asal):
>
> > We must now turn to consider s. 293 of the Companies Act. The law relating to fraudulent preferences is set out in s. 53 of the Bankruptcy Act, which is made applicable to companies by

s. 293 of the Companies Act, and is designed to preserve the sanctity of the *pari passu* principle by which creditors in a winding up share rateably in the assets available for distribution …

To take the matter further, it is clear law that the Court has no power to make an order setting aside payments and transfer made in the run up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied ...

The onus was, of course upon the liquidator to satisfy all the five requirements aforesaid.

... The principle of central importance underlying s. 293(1) of the Act is that where a debtor company, has at a relevant time, given a preference to any person, the liquidator may apply to the Court for an order under the section setting aside the preference.

Defendan bukan likuidator oleh itu peruntukan-peruntukan Akta Syarikat dan Akta Kebangkrapan berkenaan tidak melindungi defendan (*Sime Diamond Leasing (M) Sdn. Bhd. v. J.B. Precision Moulding Indusries Sdn. Bhd. (in liquidation) (supra)*).

Defendan juga memberi jaminan korporat tanpa syarat. Apabila MMT dan PUJ gagal membayar hutang plaintif berhak menuntut bayaran hutang MMT dan PUJ. Dari segi prinsip undang-undang yang mantap tanggungjawab penjamin ialah untuk membayar pinjaman jika peminjam gagal membuat bayaran (*Maplelee Property Sdn. Bhd. v. Tan Lee Fon (supra)*). Petisyen penggulungan MMT dan PUJ adalah suatu bukti jelas kegagalan MMT dan PUJ memenuhi tuntutan hutang. Bila MMT dan PUJ digulung ia adalah suatu manifestasi nyata syarikat berkenaan tidak cair (insolvent) dan tidak mampu membayar hutang. Saranan pihak defendan bahawa tuntutan plaintif adalah pramasa tidak berasas kerana MMT dan PUJ gagal membuat bayaran mengikut jadual seperti dalam perjanjian. Dengan kegagalan MMT dan PUJ hak plaintif bermula untuk membuat tuntutan terhadap defendan (sila lihat kes *Nadefino Ltd v. Kevin Corporation Sdn. Bhd* [1978] 2 MLJ 59).

**[15]** In my view, the proposition of law enunciated by Wan Adnan Muhamad H is equally applicable in this case. The uncontroverted facts in this case revealed that the presentation of the petition of winding up and the winding up order against Victory Industries is clear evidence that the debtor was unable to pay its debt and henceforth has given the plaintiff the right to bring a suit against the defendants. In such a situation, I am unable to sustain the defendant's submission on undue preference as a triable issue.

**[16]** The final issue advanced by the third defendant is that the documents relating to the guarantee in this case was not duly stamped, ie, it was stamped for a lesser sum thus making the document inadmissible as evidence. To appreciate the defendant's contention, it is worthy to reproduce the passage of Salleh Abbas LP's judgment in the case of *Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd & Ors* [1982] CLJ 66; [1982] CLJ (Rep) 217 concerning the ambit and purpose of the Stamp Ordinance, 1949. He said:

> The purpose of the Stamp Ordinance 1949 is to impose and to collect taxes on legal and commercial documents by compelling these documents to be stamped on pain of being inadmissible. The Ordinance provides that payment of duty can be made before or at the time when documents are executed, and even later except for certain type of documents. The duty must be paid within 30 days of execution or even on a later date when the documents are used provided that an appropriate penalty is paid. Failure to pay the duty or the penalty prevents the use of the instrument. If the use is intended for a judicial proceeding the document is not admissible until the duty or the penalty is paid, unless the document belongs to special categories stated earlier. To ensure that the duty is paid s. 51 imposes an obligation on those whose function is to receive evidence including the Courts to be specially vigilant to see whether a document produced before them is duly stamped or not. If it appears to be unstamped the authority concerned has no choice but to impound the document and admit the same on payment of the necessary duty or penalty under proviso (a) to s. 52(1) and thereafter send the impounded documents to the Collector of Stamp Duly together with the duty or penalty for stamping under s. 53. Because a stamp objection really relates to the need of safeguarding Government revenue, the practice in England regarding an unstamped document is that the Court will admit such document upon payment of the necessary duty or penalty if any, unless of course the lack of stamping goes to the root or the validity of the document itself or the case is a revenue dispute. Further the General Council of the Bar also ruled that it is unprofessional for an advocate to make a stamp objection in those two cases, ie, revenue cases and cases in which lack of stamping goes to the root or validity of the document.

**[17]** The law is thus clear that a stamp objection really relates to the need of safeguarding Government revenue unless the lack of stamping goes to the root or the validity of the document itself. In the light of the above I must say that I am unable at this stage to be in agreement with the submission of the learned counsel for the 3rd defendant that the documents involved in this case was not duly stamped and consequently inadmissible in evidence. Conversely I am of the view that the non-stamping of the guarantee is not a triable issue as would require

a trial in order to determine it. My findings is well fortified by the views expressed by Gunn Chit Tuan SCJ In *American Express International Banking Corp v. Tan Loon Swan* [1992] 1 CLJ 9; [1992] 1 CLJ (Rep) 1:

> We were referred to and agree with the decision of the Federal Court in *Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd. & Ors* [1982] CLJ (Rep) 21, in which the Federal Court held that it was clear that under s. 52(1) of the Stamp Ordinance 1949, except for certain types of instruments prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under ss. 43 and 47 of the Ordinance. We would also agree with the views of the Federal Court that it is the responsibility of the Court under s. 51 of that Ordinance to impound unstamped documents, if produced, and to admit them under proviso (a) to s. 52(1) on payment of stamp duty or penalty, if any. As regards the question whether the Bar Council in this country would consider any of its members as being unprofessional for raising a stamp objection, we also agree that this is a matter left to that body to decide. The Court and Counsel appearing before it as officers of the Court are only under an obligation to draw the Court's attention to its powers under ss. 51 and 52(1) including its provisos. We therefore agreed with and approve the views of V.C. George J expressed in *Elders Keep Ltd: (Formerly known as Keep Bros. Ltd) v. Luen Mei Plastic Industries Sdn. Bhd. & Ors* [1989] 1 CLJ (Rep) 517 that the non-stamping of documents concerned does not provide a triable issue.

**[18]** That case was referred and followed by Zulkefli Ahmad Makinudin J (as he then was) in the case of *Public Bank Berhad v. Siaw Sat Lin* [2001] 1 LNS 145, where he opined:

> On this issue of unstamped documents I would like to refer to the case of *American Express International Banking Corporation v. Tan Loon Swan* [1992] 1 CLJ 9; [1992] 1 CLJ (Rep) 1. In that case the document, which was unstamped, was that of a guarantee executed as security for facilities granted by the plaintiff. The defendant in that case raised, as a triable issue, the fact that the said guarantee was unstamped and therefore not admissible. The Supreme Court held that although the guarantee document had not been stamped, the non-stamping of the document did not provide a triable issue. The court has power and responsibility to impound unstamped documents, if produced, and to admit them on payment of stamp duty or penalty, if any, under proviso (a) to Section 52(1) of the Stamp Ordinance 1949.

**[19]** Based on the authorities referred to above I find that the issue of non-stamping of guarantee raised by the third defendant, is not a triable issue and not relevant in an O. 14 application. Equally this issue does not merit further investigation. Be that as it may, from the affidavit

A evidence I find that the disputed documents were duly stamped, according to the Stamp Ordinance 1949 that was in force at the time when the letter of guarantee was executed by the 3rd defendant and an adequate payment was duly paid by the plaintiff.

B **[20]** For the reasons given it is my findings that the decision of the learned SAR was not in error. I therefore confirmed the same and dismissed this appeal with costs.

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